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YONG YOK MIN

v.

THE MIRI MUNICIPAL COUNCIL

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: Q-02-291-1995]

C

22 JUNE 2006

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local authority - Issuance of licence subject to certain conditions - Whether conditions breached - Reasonable and fair procedure - Whether*

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administrative body acted reasonably - Miri District Council (Markets) By-laws, By-law 5(1)

LOCAL GOVERNMENT: *Licence - Cancellation of licence - Issuance of licence subject to certain conditions - Whether conditions breached - Reasonable and fair procedure - Whether administrative body acted*

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reasonably - Miri District Council (Markets) By-laws, By-law 5(1)

The respondent issued a licence to the appellant to run a cooked food stall at the open market in Miri subject to the condition that the plaintiff be required to trade personally at the stall and also

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subject to condition 18, which required stall-holders such as the plaintiff not to be absent from the stall for a continued period of five days in a week without prior permission from the respondent. The respondent subsequently issued a show cause letter to the appellant pursuant to s. 25(5) Local Authority Ordinance asking

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the appellant to show cause why her licence should not be revoked, and calling for an explanation as to why she had not traded personally at her own stall for a long period. The respondent contended that the plaintiff's explanation that she had engaged her niece to assist her in running the stall was in direct

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contravention of By-law 5(1) Miri District Council (Markets) By-laws. Evidence was placed before the learned judge that from the inspection carried out by the respondent at the market, the plaintiff had failed to trade for the period 1 July 1993 to 7 October 1993 (both dates inclusive). The learned judge found in

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favour of the respondent resulting in the current appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The fact that the reasonableness of condition 18 had not been challenged was fatal to the plaintiff's case. She did breach condition 18 and By-law 5(1). In the light of these facts, the defendant acted reasonably in issuing the show cause notice. It was not necessary for the defendant, having issued the show cause letter, to afford the plaintiff an opportunity to state her case. Applying settled principles of law, the defendant as the repository of the power to grant and to cancel licences adopted a reasonable and fair procedure with regard to the circumstances of this case. (paras 7, 8 & 9)

(2) The plaintiff in this case had no regard at all for the law. After she was granted a licence, she got her niece to run the stall without obtaining the defendant's consent, and the niece went missing for several days thereby defeating the very object of the grant of the licence. Hence, a reasonable administrative body armed with these facts would have acted as the defendant did. It was quite apparent that the plaintiff suffered no injustice at all in this case. (para 9)

Bahasa Malaysia *translation of headnotes*

Responden telah memberi lesen kepada perayu untuk membuka sebuah gerai makanan masak di pasar terbuka Miri dengan syarat bahawa perayu hendaklah berniaga sendiri di situ dan bahawa perayu adalah tertakluk kepada syarat 18 yang melarang perayu dari tidak berada di gerai selama lima hari berturut-turut dalam seminggu kecuali dengan mendapat kebenaran responden terlebih dahulu. Responden kemudian mengeluarkan surat tunjuk sebab kepada perayu di bawah s. 25(5) Ordinan Pihak Berkuasa Tempatan meminta perayu memberi sebab mengapa lesen beliau tidak boleh dibatalkan, dan memberi penjelasan mengapa beliau tidak berniaga di gerainya sejak beberapa lama. Responden mengatakan bahawa penjelasan perayu bahawa beliau telah melantik anak saudaranya bagi membantu beliau digerai tersebut jelas telah melanggar Undang-undang kecil 5(1) Undang-Undang Kecil Majlis Daerah (Pasar) Miri. Keterangan telah dibentang dihadapan yang arif hakim bahawa dari pemeriksaan yang dibuat oleh responden di pasar, perayu gagal berniaga dari 1 Julai 1993 hingga 7 Oktober 1993 (termasuk kedua-dua tarikh). Yang arif hakim memutuskan kes untuk responden sekaligus mencetuskan rayuan di sini.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Fakta bahawa kemunasabahan syarat 18 tidak dicabar adalah fatal kepada kes perayu. Beliau telah melanggar syarat 18 dan Undang-undang kecil 5(1). Berdasarkan fakta ini, responden telah bertindak secara yang munasabah apabila mengeluarkan notis tunjuk sebab. Adalah tidak perlu bagi responden, setelah mengeluarkan surat tunjuk sebab, untuk memberikan perayu peluang untuk mengemukakan kesnya. Memakai prinsip undang-undang mantap, responden, selaku pihak berkuasa yang mengeluar dan membatalkan lesen, telah mengambil pendirian yang munasabah dan adil dalam halkeadaan kes.

(2) Perayu dalam kes ini langsung tidak mempedulikan undang-undang. Setelah diberikan lesen, beliau membawa anak saudaranya untuk menjaga gerai tanpa mendapat kebenaran responden, manakala anak saudaranya pula telah menghilangkan diri untuk beberapa waktu sekaligus mensia-siakan tujuan pemberian lesen. Adalah jelas bahawa, suatu badan pentadbiran, berhadapan dengan fakta yang sama, akan bertindak sepertimana responden bertindak. Juga jelas bahawa perayu tidak menanggung apa-apa prejudis dalam kes ini.

Case(s) referred to:
Mamat Talib v. Abdul Jalil Rashid [2005] 4 CLJ 892 CA ***(foll)***

Legislation referred to:
Local Authority Ordinance, s. 25(5)
Miri District Council (Markets) By-laws, By-law 5(1)

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co
For the respondent - Lim Swee Huat; M/s SH Lim & Co

[Appeal from High Court, Miri; Originating Summons No: MR 3-1994]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The facts relevant to this appeal fall within a narrow compass. The respondent issued a licence to the appellant to run a cooked food stall at stall No. 15 the open market in Miri. That licence was subject to conditions. On 24 July 1993, the

respondent issued to the appellant a show cause notice pursuant to s. 25(5) of the Local Authority Ordinance. The notice asked the appellant to show cause why the appellant's licence should not be revoked and called for an explanation in that behalf. The ground set out in the notice was as follows:

> You have been found not trading personally at your own stall for a long period.

[2] The appellant provided an explanation which we will address in a moment. What needs to be said for the present is that the defendant did not accept the plaintiff's explanation as being reasonable.

[3] Now, it is not in dispute that the licence contained a condition that the plaintiff be required to trade personally at the stall No. 15. There was also a condition 18 which required stall holders such as the plaintiff not to be absent from the stall for a continued period of five days in a week without prior permission from the defendant. It is common ground that no such permission was ever sought. Evidence was placed before the learned judge that from the inspection carried out by the defendant at the market, the plaintiff had failed to trade for the period l July 1993 to 7 October 1993 (both dates inclusive). This evidence was unchallenged.

[4] The plaintiff's explanation for her absence from stall No. 15 may be summarised thus. The business that was carried on at the stall consisted of the preparation, sale, service, removal and cleansing of the cooked food and tables and the necessary utensils and apparatus. From the very inception of the business the plaintiff took on her niece Wong Nyuk Lan to assist her. She trusted Wong Nyuk Lan. The plaintiff also engaged 2 helpers to assist her on a daily basis to run the stall as it would have been impossible for her to attend alone to the work that was entailed. At the material time her niece Wong Nyuk Lan was away to deliver her child.

[5] What emerges from the plaintiff's evidence is that she was never at any time personally present at stall No 15 and that she had in fact handed over the running of the stall to her niece. This, the defendant says was in direct contravention of By-law 5(1) of the Miri District Council (Markets) By-Laws which provides as follows:

> no stall-holder shall employ, engage or utilise the services of an assistant, whether paid or otherwise, except with the written permission of the Council.

And there is no dispute that the plaintiff did not at any time seek the defendant's permission to engage the niece to run the stall.

[6] Based on the material placed before him the learned judge said:

> I am of the view that the terms and special conditions in the licence issued to the plaintiff, the Market By-Laws and the Ordinance are reasonable and fair. The provision in condition 18 in the special conditions (Exhibit 'VTH1') that the plaintiff must not be absent for a continuous period of 5 days in a week is valid. The said condition 18 applies to all persons who want to earn a living by selling cooked food. There is no restraint of trade imposed by the defendant. If the plaintiff does not wish to continue to personally trade at stall No. 15, she can find other jobs or work.

[7] Learned counsel for the plaintiff criticised the judge for making this finding. Since everything turned on the validity of condition 18, we asked learned counsel for the appellant whether the reasonableness of condition 18 had been challenged. He informed us that no such challenge had been taken. In our judgment this is fatal to the plaintiff's case. To recall, her case is that her licence had been wrongfully revoked for breach of condition 18. But the short answer is that she did breach condition 18. And not only that. She also breached By-law 5(1). In the light of these facts we think that the defendant acted reasonably in issuing the show cause notice.

[8] It is clear that having issued the show cause notice, the defendant did afford the plaintiff an opportunity to state her case. An oral hearing was not accorded. But that is not necessary. And for this purpose all we need do is to reproduce what we said in *Mamat Talib v. Abdul Jalil Rashid* [2005] 4 CLJ 892:

> We begin with what we consider to be the following well-established propositions:
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> (i) A decision by a public law decision-maker may be struck down by the courts on grounds of procedural unfairness or Wednesbury unreasonableness (see, *Anisminic Ltd v. Foreign Compensation Commission* [19691 2 AC 14 7).

(ii) The content of procedural fairness is not fixed. It is a flexible concept and whether there has been procedural fairness in a given case depends on the facts and circumstances of that case. See, *The Board of Education of the Indian Head School v. Knight* [1990] 1 SCR 65: *Haji Ali bin Haji Othman v. Telekom Malaysia Berhad* [2003] 3 MLJ 29.

(iii) The essential requirements of an acceptable procedure is that it be fair and impartial. See, *B Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] 2 MLJ 169. Fairness includes, but is not confined to, the right to be heard which in some cases may be satisfied by the grant of a right to make written representations (*Ghazi bin Mohd Saw v. Mohd Haniff bin Omar & Anor* [1994] 2 MLJ 114) whilst in others it can only be satisfied by an oral hearing. See, *Sentivelu v. Public Services Commission* [2005] 5 MLJ 393.

(iv) The test to determine whether the particular procedure adopted in a given case was fair is subjective. The court must place itself in the shoes of the decision-maker and decide whether the procedure adopted provided adequate fairness to the person concerned. See, *Kioa v. West* [1985] 159 CLR 550 where Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, **the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.** (emphasis added.)

[9] Applying settled principles of law, we are satisfied that the defendant as the repository of the power to grant and to cancel licences adopted a reasonable and fair procedure having regards to the circumstances of this case. The next question is whether the decision to cancel or revoke the plaintiff's licence is Wednesbury unreasonableness. Look at the facts. Here you have a plaintiff who has apparently no regard at all for the law. She is granted a licence and no sooner than the ink is dry on the paper she gets her niece to run the stall without obtaining the defendant's consent. Then the niece goes missing for several days thereby defeating the very object of the grant of the licence. In our judgment, a reasonable administrative body armed with these facts would have acted as the defendant did. It is quite apparent that the plaintiff suffered no injustice at all in this case.

[10] For the reasons already given the appeal was dismissed and those orders made which are usually consequent upon a dismissal.